LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 4 1972
E. ROBERT SEAVER, CLERK

No. 71-661

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-661

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of failing to report for induction, in violation of 50 U.S.C. App. 462, and sentenced to three years' imprisonment. The court of appeals remanded the case to the district court "without limitation of scope but especially for consideration of * * * the intervening decision of Gutknecht v. United States, 396 U.S. 295" (Pet. App. 1a). Following a hearing, the district court affirmed the earlier convic-

453-401—71

tion (Pet. App. 7a–11a), and the court of appeals affirmed *per curiam* (Pet. App. 15a).[1]

1. The essential facts are not in dispute. On October 4, 1963, petitioner registered with his local draft board in Los Angeles, California. He was classified I–A on February 3, 1965. On February 16, 1965, he was ordered to report for a physical examination on March 4, 1965. Petitioner failed to comply with that order. (Pet. 2–3.)

On September 19, 1965, petitioner was again ordered to report for a physical on October 8, 1965, and again he failed to report. On December 6, 1965, the board mailed to two addresses that petitioner had given it a "Delinquency Warning" (Cal. SSS Form 304). The notices were returned marked "addressee unknown"; the board mailed another set, which were also returned. Thereafter, petitioner was declared delinquent for failing to report for the October 8 physical and to advise the board of his current address, and a notice to this effect was mailed to him on May 4, 1966. (Pet. 3–4; Pet. App. 17a–18a.)

On February 21, 1967, petitioner was ordered to report for induction on March 7, 1967. This notice was returned undelivered on February 23, 1967, and petitioner did not report for induction as ordered. The board, acting on the advice of the State Director, on June 20, 1967, mailed a second order to report for induction to a third address that petitioner had given

[1] On November 27, 1971, Mr. Justice Douglas granted petitioner's application for bail pending disposition of the petition for a writ of certiorari.

it, in St. Paul, Minnesota. Though this notice was not returned, petitioner failed to report for induction on the prescribed date (July 11, 1967). The present indictment and conviction followed. (Pet. 4: Pet. App. 19a–20a.)

On remand after the first appeal, the district court conducted a hearing, at which the government presented the local board's "delivery lists" for pertinent dates (see Pet. App. 21a–29a), and the board's executive secretary testified that petitioner's induction had not been accelerated by reason of his delinquency. The district court found that petitioner would have been ordered to report for induction long before the date on which he finally was ordered, but failed, to report (July 11, 1967), if he had complied with the board's procedures and not been declared a delinquent (Pet. App. 8a). Therefore, the court reasoned, petitioner had not been ordered for induction at a younger age than he would have been had he not been declared delinquent, and accordingly his induction was not improperly accelerated under *Gutknecht* (Pet. App. 9a). The court concluded further that the induction order without a pre-induction physical and finding of acceptability did not prejudice petitioner's substantial rights, since he would have received a physical examination and been found acceptable prior to induction if he had reported as ordered (*ibid.*). On the basis of these findings and conclusions, the court affirmed the conviction (Pet. App. 10a). The court of appeals affirmed *per curiam* (Pet. App. 15a), and denied a

petition for rehearing and suggestion for rehearing en banc (Pet. App. 16a).

2. Petitioner asserts that his order of induction was unlawful because it was issued after he had been declared delinquent, in violation of the principles enunciated in *Gutknecht* v. *United States*, 396 U.S. 295, and because it was not preceded by a pre-induction physical examination. Neither claim has merit.

a. In *Gutknecht*, this Court held that local boards cannot declare a registrant delinquent for the purpose of accelerating his induction out of turn, as a punitive sanction for his failure to comply with Selective Service rules and regulations. The Court did not, however, forbid local boards from declaring delinquent registrants, like petitioner, who fail to report for a physical examination as ordered, nor did it proscribe the prosecution of such registrants for refusing to report for induction pursuant to a subsequent induction order, when there has been no attempt to punish them by accelerating their induction out of turn.

In the present case, the district court found, after the hearing on remand, that petitioner's induction was not accelerated as a result of his being declared delinquent, but, to the contrary, was substantially delayed because of the delinquency declaration (see Pet. App. 8a). On the basis of its findings, the court correctly concluded that *Gutknecht* is not applicable, and that petitioner's induction order was not unlawful under that case.

We do not understand petitioner to challenge the court's legal conclusions. Instead, his contention is

that when a delinquency declaration has occurred, the government must show that it did not accelerate the registrant's induction, and that despite the district court's findings that petitioner's induction was not accelerated, "[t]he government here failed totally in sustaining its burden" (Pet. 13). This question necessarily turns on the particular facts presented, and thus does not warrant plenary review by this Court; in any event, the rulings by the courts below were correct.

There is, we submit, ample support in the record for the district court's findings that petitioner's induction was not accelerated because he was declared delinquent. The court considered not only testimony to this effect from the board's secretary, but also had before it the delivery lists for dates pertinent to petitioner's induction order. This evidence showed that 21 registrants younger than petitioner, and in the same classification for induction purposes as he was, received orders to report for induction on or before the date prescribed by his order (see Pet. App. 2a–3a, 8a). From this, the court properly inferred that petitioner would have been ordered to report for induction before he actually was, but for his delinquent status, and that the delinquency delayed, rather than accelerated, his induction.

Though petitioner claims that other types of evidence would have been more appropriate (Pet. 13–14), he did not introduce any such other evidence or attempt to rebut the government's proof. We agree that the kind of evidence that petitioner suggests might

be helpful in some cases. But this does not mean, as petitioner apparently would have this Court hold, that the government can show the absence of acceleration only through such evidence. On the basis of relevant and substantial evidence of no acceleration, the district court properly held that the government met its burden of proof on this issue; certainly its decision in this respect was not clearly erroneous. Compare *Misenhimer* v. *United States*, C.A. 9, No. 71–1384, decided July 22, 1971, certiorari denied, No. 71–5330, November 22, 1971.

Contrary to petitioner's contention, the decision below does not conflict with *United States* v. *Dobie*, 444 F. 2d 417 (C.A. 4). The holding in *Dobie* that the government failed to show during the remand hearing in that case that no acceleration occurred turned on the particular facts, and the circumstances in which Registrant Dobie was ordered to report for induction are significantly different from those here. Unlike petitioner, Dobie had a deferment before he was declared delinquent, and, if he had reported as ordered, it was "equally probable" that he would not have been inducted, but instead deferred (444 F. 2d at 421). And the delivery lists introduced in *Dobie* involved only periods prior to Dobie's order, whereas the lists here included the list on which petitioner's induction order was based, for July 1967 (see Pet. App. 26a–29a).

b. Nor was petitioner's induction order unlawful because he was not given a pre-induction physical examination and found acceptable before that order issued.

Petitioner correctly points out (Pet. 16–17) that regulations applicable when petitioner was ordered to report permitted local boards to issue induction orders to delinquents without a prior pre-induction physical and statement of acceptability, and that petitioner received his order pursuant to those regulations (see 32 C.F.R. 1631.7(a)). But it does not follow, as petitioner asserts, that his order was unlawful under *Gutknecht*. That case did not involve Section 1631.7(a), the regulation challenged here, but instead the delinquency regulations themselves (32 C.F.R. pt. 1642). Section 1631.7(a), moreover, does not authorize delinquency status, but merely permits the board to order delinquents, along with certain others, to report for induction without first receiving a physical and acceptance notice. Thus, an induction order pursuant to this section would not indicate whether the induction thereunder was wrongly accelerated, the only concern in the *Gutknecht* decision.

The procedures under Section 1631.7(a) were essential to the induction process, since, by reason of petitioner's repeated refusals to report, his local board could not provide a pre-induction physical and acceptance notice. These procedures clearly did not prejudice petitioner, in view of the fact that he would have received a physical and been found acceptable prior to induction if he had reported as ordered. The rejection of petitioner's claims on this issue by the courts below was correct.

We think that *Battiste* v. *United States*, 428 F. 2d 801 (C.A. 5), which petitioner contends conflicts with

the decision below, stands only for the proposition that an induction order is invalid where the record makes it "unequivocally clear that the induction order was based not upon the normal sequence of call but upon appellant's delinquency status" (428 F. 2d at 802). As we set out above, the record in the present case shows that petitioner's induction order was not altered in the only sense relevant under *Gutknecht*, by accelerating it ahead of its normal sequence. Neither *Gutknecht* nor *Battiste* applies to this situation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1971

PETITIONERS'

REPLY

MEMORANDUM

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 22 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-661

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

MICHAEL E. SOMERS
DANIEL KALLEN
2512 Wilshire Boulevard
Santa Monica, California

MELVIN L. WULF
c/o American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioner

INDEX

Petitioner's Reply Memorandum

Table of Authorities

PAGE

Cases:

Battiste v. United States, 428 F.2d 801 (5th Cir. 1970) ..1, 6
Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 4

Clay v. United States, 403 U.S. 698, 4 SSLR 3258 (1971) 7

Dickinson v. United States, 346 U.S. 389 (1953) 4

Greene v. McElroy, 360 U.S. 474 (1959) 6
Gutknecht v. United States, No. 71 Oct. 7, 1969 5
Gutknecht v. United States, 396 U.S. 295 (1970) 1, 2, 4, 5, 6, 7

Sicurella v. United States, 348 U.S. 385 (1955) .....

Thompson v. Louisville, 362 U.S. 199. (1960) 3

United States v. Bruce, 4 SSLR 3508 (4th Cir. 1971) .. 2, 3
United States v. Corely, 4 SSLR 3491 (D. S. Car. 1971) 3
United States v. Dobie (I), 429 F.2d 32 (4th Cir. 1970) 3
United States v. Dobie (II), 444 F.2d 417 (4th Cir. 1971) 1, 2, 3, 4
United States v. Kohls, 441 F.2d 1076 (9th Cir. 1971) ..1, 2, 6
United States v. McClintock, 2 SSLR 3685 (N.D. Cal. 1970) 2, 6
United States v. Thomas, 422 F.2d 1327 (9th Cir. 1970) 3

PAGE

Statute:

50 U.S.C. App. §455(a)(1) 6

Regulations:

32 C.F.R. §1621.6 2
32 C.F.R. §1631.7(a) 2, 5, 6
32 C.F.R. §1642 ..... 2, 5
32 C.F.R. §1642.13 5

Other Authority:

Local Board Memorandum 14, ¶5.(b), SSLR 2160 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-661

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The Solicitor-General's short memorandum in opposition, in attempting to defend the decision below, appears to place the Government in direct contradiction to this Court's holding in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), and the post-*Gutknecht* decisions of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971), the Fifth Circuit in *Battiste* v. *United States*, 428 F.2d 801 (1970) and apparently the Ninth Circuit itself in *United States* v. *Kohls*, 441 F.2d 1076 (1971). Moreover, in its effort to persuade this Court that the decision below does not pose such a conflict, the Government's memorandum misreads *Dobie* and *Battiste*.

1. The government's initial contention[1] that plenary review of the issues tendered by this important case are un-

[1] Page 5, Memorandum in Opposition (hereinafter "Mem. Op.").

necessary, because the questions presented turn only "on the particular facts" of this case, demonstrates a fundamental misunderstanding of both the questions presented and their far reaching importance.

At issue here are the questions of (1) what quantum and method of proof the government must meet in attempting to secure criminal convictions for failing to report for induction when the evidence *prima facie* indicates[2] that the defendant's induction order was issued in violation of *Gutknecht* v. *United States, supra;* and (2) where the induction order was concededly[3] issued in conformity with and in furtherance of a separate portion of the Selective Service delinquency scheme[4] implicitly invalidated in *Gutknecht,* whether such an order is *per se* invalid. These issues have proved elusive to the Ninth Circuit itself[5] (see

---

[2] In the instant case petitioner was declared delinquent (A. 18a) (all references "A" refer to the appendix to the Petition for Certiorari); was listed on a separate delivery list for delinquent inductees (A. 23a, 26a), see Local Board Memorandum 14, ¶5.(b), SSLR 2160, 2161, *United States* v. *Bruce,* 4 SSLR 3508 (4th Cir. 1971); was issued a "Delinquent" induction order (A. 19a, 20a); was not given (as was conceded) a pre-induction physical examination nor issued a DD Form 62, "Statement of Acceptability," see *United States* v. *McClintock,* 2 SSLR 3685 (N.D. Cal. 1970); *Kohls, supra.* No proof was offered at trial by introduction of the "Classification Record," see 32 C.F.R. §1621.6, that registrants *older* than petitioner were not called after him. See *Dobie, supra* at 420.

[3] "Petitioner correctly points out (Pet. 16-17) that regulations applicable when petitioner was ordered to report permitted local boards to issue induction orders to delinquents without a prior pre-induction physical and statement of acceptability, and that petitioner received his orders pursuant to those regulations . . ." (p. 7, Mem. Op.).

[4] 32 C.F.R. §1631.7(a)(1), §1642 (1969).

[5] The Solicitor-General's memorandum does not even attempt to rebut the contentions in the petition that there is an apparently continuing inconsistency on these questions among various panels of the Ninth Circuit.

cases cited at pp. 8 and 11, n. 3, Pet.) and have caused a clear and irreconcilable conflict between the circuits. See *United States* v. *Bruce*, 4 SSLR 3508 (4th Cir. 1971); *Dobie, supra; United States* v. *Corely*, 4 SSLR 3491 (D. S. Car. 1971).

Initially, the government ambiguously characterizes the documents it utilized to attempt to sustain its burden as "pertinent." (P. 5, Mem. Op.) At best, they were only marginally so, for, as we stated in our petition at pp. 13-15, the most crucial documents--delivery lists for calls *after* petitioner's were not produced, nor was the "Classification Record," SSS Form 102. We submit that *any* conviction so based on a finding of non-acceleration is patently violative of due process because it is factually unsupportable as a matter of law. Cf. *Thompson* v. *Louisville*, 362 U.S. 199 (1960). Petitioner submits that the only conclusive manner of proving that no "de facto"[6] acceleration occurred is by the method which we described in our petition and which the Fourth Circuit has adopted. While conceding that "the kind of evidence that petitioner suggests might be helpful"[7] in cases of this type, the government unabashedly chides *petitioner* for not producing it *himself* despite the fact that it was clearly the government's burden of proof upon remand. See e.g. *United States* v. *Dobie (I)*, 429 F.2d 32, 33 (4th Cir. 1970); *United States* v. *Thomas*, 422 F.2d 1327, 1328 (9th Cir. 1970).[8]

---

[6] As opposed to "de jure" acceleration. See Sec. 2, pp. 5-7 *infra*.

[7] Pp. 5-6, Mem. Op.

[8] The assertion, propounded by the district court on the basis of the executive secretary's outrageously contradictory and plainly incredible testimony, and here parroted (p. 5 Mem. Op.) by the government, that petitioner's induction was "delayed" by the delin-

The government's conceptual inability to answer the issues presented in the petition for certiorari is directly attributable to a jaundiced reading of *Gutknecht, supra,* as somehow not finally placing to rest a ". . . monster which rule[d] no practical limits upon its discretion."[9] To have reasoned (Mem. Op. p. 3)—or, more accurately, speculated, cf. *Dickinson* v. *United States,* 346 U.S. 389, 397 (1953)—that petitioner "had not been ordered for induction at a younger age than he would have been had he not been declared delinquent" (Mem. Op., p. 3) is not the issue. The critical question is whether he was ordered for induction unlawfully, while there were other registrants, older than he, who were available for induction. An unlawful delinquency induction order, issued to a registrant out of his proper turn, is plainly not legitimized by judicial speculation that it was no more unlawful than out-of-turn orders issued to other registrants of the same age. Thus, the Solicitor-General contends in the face of the most direct authority to the contrary that this Court "did not . . . forbid local boards from declaring delinquent registrants, like petitioner, . . ." (p. 4, Mem. Op.). Clearly, that is exactly what this Court

---

quency proceedings themselves, is obvious bootstrapping when seen in the light of the finding of non-acceleration itself. It is plainly not enough for the courts below.

The distinctions drawn by the government with respect to *United States* v. *Dobie (II)* are (1) meaningless as to the issues here before the Court and (2) factually erroneous. E.g., contrary to the government's assertion that the delivery lists for Dobie's call were not produced in that case but were here, counsel for petitioner here, who was also Dobie's counsel, assures the Court that such a list was produced and the opinion clearly so indicates. *Dobie (II), supra,* at 420 ("The government produced the March list . . ."). As in *Dobie* however, it should be held that the government's undoing was its failure to produce lists *subsequent* to petitioner's call.

[9] *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167 (1962).

did in holding that the regulations, 32 C.F.R. §1631.7(a)(1) and §1642, lacked any statutory authority for existence. *Gutknecht, supra* at 306.

The Selective Service System's delinquency regulations, 32 C.F.R., Part 1642 (1969), at the time they came before this Court for review in *Gutknecht,* were given teeth through the priority induction provisions of 32 C.F.R. 1631.7(a) (1969). Indeed, the primary punitive sanction of the entire delinquency scheme, priority induction, was nowhere enunciated, in Part 1642. Rather, 32 C.F.R. 1642.13 provided that delinquents were to be ordered "to report for induction in the manner provided in section 1631.7 . . ." Thus, this Court in *Gutknecht* reviewed the priority induction scheme provided for in Part 1642 and executed through 1631.7(a)(1) *in extenso* and flatly invalidated the entire scheme. See 396 U.S. at 298, n. 1 and accompanying text. Moreover, the assertion that *Gutknecht* "did not involve Section 1631.7(a)", p. 7, Mem. Op., is a stunningly disingenuous retreat from the previous admission set forth in the Solicitor-General's brief at p. 136, n. 22 in *Gutknecht* v. *United States,* No. 71 Oct. 7, 1969:

> ". . . 32 C.F.R. 1631.7 . . . That regulation providing for priority induction of delinquents and volunteers ahead of all other registrants, *is in turn linked to 32 C.F.R. 1642.13,* which calls for the induction of delinquent registrants in the manner provided in section 1631.7 . . ." (Emphasis added.)

2. In *Gutknecht,* this Court primarily concerned itself with acceleration of induction through "de facto" shifting of a registrant's position in the order of call. However, another subtle, acceleratory device has now been embodied

in 1631.7,—a device which was, by the government's own admission, see p. 7, Mem. Op., used in this case. This provision authorizes the induction of delinquents without affording them a pre-induction physical examination. This procedure, applied only to delinquents[10] hardly comports with this Court's holding in *Gutknecht* that, in accordance with the language of *Sec. 5(a)(1)*,[11] "the selection of persons for training and service shall be accomplished in an "impartial manner," 396 U.S. at 304.[12]

Petitioner submits that the amended regulation's grant of authority is but a form of "de jure" acceleration which impliedly violates the holding of *Gutknecht* and is a procedure based on an invalidated regulatory scheme. *United States* v. *McClintock*, 2 SSLR 3685 (N.D. Cal. 1970), *Battiste* v. *United States*, 428 U.S. 801, 802 (5th Cir. 1970); *United States* v. *Kohls*, 441 F.2d 1076, 1077 (9th Cir. 1971). The government's assertion that *Battiste* is inapplicable because there a finding of de facto acceleration was made, see Point I, *supra*, is clearly erroneous. As we pointed out in our Petition at p. 19, the Fifth Circuit ruled the induction order invalid and did so while granting for argument's sake the government's contention here raised. See italicized portion of quote at Pet. p. 19. Indeed, the Fifth Circuit's position seems even more absolute than a mere holding that delinquent inductions of registrants who fail to appear at physical examinations are invalid. Rather, *Battiste* appears to hold that *any* delinquent induction is

---

[10] And volunteers. See (A. 12a-14a).

[11] 50 U.S.C. App. §455(a)(1).

[12] It is interesting to note that the June, 1970 amendment to 1631.7, see Pet. 17, n. 9, was accomplished solely by executive order without any authorizing statutory amendment. Contra, *Gutknecht*, *supra* at 396 U.S. 307; *Greene* v. *McElroy*, 360 U.S. 474 (1959).

per se invalid because it is based on a regulatory scheme held invalid.

While a finding of prejudice to petitioner from the failure to grant him a physical would make it unnecessary for the Court to reach that question, the government's contention that no prejudice having occurred to petitioner, his order was therefore not violative of *Gutknecht*, is nevertheless unavailing for a totally separate reason. In *Clay* v. *United States*, 403 U.S. 698, 4 SSLR 3258 (1971) this Court recognized that the courts had a specific interest in insuring the legal integrity of the Selective Service System by requiring that a man's induction not be accomplished through unlawful means. There, this Court, quoting its prior decision in *Sicurella* v. *United States*, 348 U.S. 385, 392 (1955) stated, that "the integrity of the Selective Service System demands" that an induction not be accomplished through illegal means. *Clay, supra* at 3260. No less can be said for delinquency cases.

Certiorari should therefore be granted in order to clarify any doubt as to the scope and import of this Court's decision in *Gutknecht*,[13] as well as to resolve the plain inter-circuit conflict.

---

[13] Of course, the answer to the now tired contention, again raised here by the government, that the Selective Service System will be stymied from operating if the conviction is reversed, was dealt with in *Gutknecht* at 396 U.S. 307. If petitioner's failure to report for his physical examination (which caused the delinquency declaration) was willful, he should be prosecuted for *that* offense. We note that even at the time of indictment here, the government sought only to prosecute petitioner for failing to report for induction and ignored the physical examination transgression.

Respectfully submitted,

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

MICHAEL E. SOMERS
DANIEL KALLEN
2512 Wilshire Boulevard
Santa Monica, California

MELVIN L. WULF
c/o American Civil Liberties Union
Foundation
156 Fifth Avenue
New York, New York 10010

*Attorneys for Petitioner**

---

* Attorneys for petitioner gratefully acknowledge the assistance of Mr. Edwin Oppenheimer of the New York Civil Liberties Union.